

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
ATLANTA BRANCH OFFICE

GREAT BARRIER INSULATION COMPANY

and

Case 10-CA-34315

INTERNATIONAL ASSOCIATION OF HEAT  
AND FROST INSULATORS AND ASBESTOS  
WORKERS UNION LOCAL 78, AFL-CIO, CLC

*John D. Doyle, Jr., Esq.* for the General Counsel.  
*M. Jefferson Starling, III, Esq.* and *Christopher T.  
Terrell, Esq. (Balch & Bingham, LLP)*, of  
Birmingham, Alabama, for the Respondent.  
*Mr. William Lemus*, of Spring Hill, Florida for the  
Charging Party.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: A charge was filed on March 25, 2003, by International Association of Heat and Frost Insulators and Asbestos Workers Union Local 78, AFL-CIO, CLC (Union or Insulators) against Great Barrier Insulation Company (Respondent or GBIC).<sup>1</sup> On May 30, a complaint was issued which alleges that Respondent (1) violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), on January 15 by (a) supervisor James Matthews interrogating employees about their union activities, (b) supervisor Ryan Hawkins promulgating an overly-broad and discriminatory rule prohibiting its employees from engaging in Union activities, interrogating its employees regarding their union membership, activities, and sympathies, threatening its employees with unspecified reprisals because they engaged in union or other concerted activities, and created an impression among its employees that their Union and other concerted activities were under surveillance by the Respondent, and (2) violated Section 8(a)(1) and (3) of the Act by (a) failing and refusing to consider for hire and failing and refusing to hire eight applicants on January 14<sup>2</sup> and (b) terminating Miguel Aguilar on January 15 because he assisted the Union and engaged in concerted protected activities, and to discourage other employees from engaging in these activities. The Respondent denies violating the Act as alleged.

A trial was held in this matter on July 30 and 31, August 1, and September 10. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and Respondent, I make the following

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<sup>1</sup> All dates are in 2003 unless otherwise indicated.

<sup>2</sup> Tommy Beasley, Craig Francis, Nicki Gooch, Fred Marsh, Brent Newsome, Dennis Noble, Bryan Vincent, and Glen Weldon.

## Findings of Fact

## I. Jurisdiction

5           The Respondent, a Florida corporation with places of business, as here pertinent, in Decatur, and Autaugaville, Alabama, had been engaged in business as a mechanical insulation contractor, and in conducting its business operations it has provided services valued in excess of \$50,000 to customers located outside the State of Alabama. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Also, I find that the Union at all material times has been a labor organization within the meaning of Section 2(5) of the Act.<sup>3</sup>

## II. Alleged Unfair Labor Practices

15           The Respondent works throughout the United States and it has five nongeographically based divisions, including the one located at Decatur. As here pertinent, that division is responsible for work performed at the Autaugaville power plant near Prattville, Alabama and at a plant in Tonopah, Arizona. Projects are assigned to a division based on which division can handle the next project.

20           On January 14 Donald Vincent, who is the President of the Union and works as an insulator, applied for a job at Respondent. General Counsel's Exhibit 4 is the application he submitted to GBIC at its Decatur office. Five other Union members went with him to Respondent's office that day to apply for jobs, namely, Francis, Gooch, Marsh, Weldon, and Noble. All of these union members wore Union T-shirts and Marsh operated a video camera in the Respondent's office until Jason Wright, who is a Contract Manager for the Respondent asked him to turn it off. Vincent testified that he believed that GBIC is a nonunion contractor; that he has worked at about 20 different power generating facilities; that he has experience in installing panel and non-panel insulation, and sheet metal up to 020 gauge in an insulation context ; that about 95 percent of the Union's referrals are for power generating facilities; that for 30 9 months in 2000 he worked for Star Insulation, which is a nonunion company that the Union tried to organize; and that he was never offered employment with GBIC. On cross-examination Vincent testified that he has been working as an insulator for 15 years; that he has been a journeyman for 8 years; that he did not know anyone who worked at GBIC prior to January 14; 35 that in January 2003 he was working on a job for Shook and Fletcher and under the collective bargaining agreement between that Company and the Union he was making \$18.93 an hour plus \$3.05 an hour for pension and between \$3.50 and \$4 an hour for insurance but the job, which lasted from August 2002 to February 2003, was winding down and he was about to be laid off; that he knew that GBIC did not offer health insurance or a pension plan; that in January 40 2003 he would have left the Shook and Fletcher job to go with GBIC because the Shook and Fletcher job was about over with anyway; that on his application with GBIC he indicated that he had 5 years experience in the insulation trade, he did not give his rate of pay with Shook and Fletcher or for former employer M&O (over \$24 an hour), he listed Local 78 as an employer because he taught some at the apprentice school, and he did not see the notification on the first 45 page of the application that "[a]pplications will be retained for a period of 30 days. After this time, applicant must reapply"; that after January 14 he never called GBIC because the secretary who was working at the window in the office that day said that she appreciated him and the

50           <sup>3</sup> At the trial herein Counsel for General Counsel amended the complaint, without objection, to allege, and I find, that Sheet Metal Workers International Association, Local 48, has been a labor organization within the meaning of Section 2(5) of the Act.

applicants with him submitting applications but the two individuals who were there before them were the last that they would be hiring; that he and the other members were told while they were in the office that GBIC was not a union company; and that upon returning to the Union hall after leaving GBIC he gave a statement to William Lemus. On redirect Vincent testified that no one at  
 5 GBIC asked him if he spoke Spanish and he did not notice such a question on the application.

Weldon, who has been an insulator and a union member since 1974, testified that he was finance and recording secretary of the Union; that on January 14 at Decatur he applied for work with GBIC and General Counsel's Exhibit 5 is his application; that he went with Marsh,  
 10 Vincent, Francis, Gooch, and Noble; that he and the people who went with him were wearing union T-shirts; that they asked the secretary at Respondent's Decatur office for applications and Marsh had his video camera on; that a man asked Marsh to turn the camera off; that when they turned the applications back into the secretary she told them that she would turn them over to human resources; that he never heard back from Respondent; that most of the jobs that he has  
 15 worked on in the last 15 or 20 years have been power houses, and the majority of the power house insulation work he does has metal work on it; that all of the jobs that he has worked since 1974 have been union jobs; that he has worked with Marsh for years applying either metal jacketing over insulation or panel metal insulation, and Marsh is an excellent insulator; that Marsh started in the insulation trade in 1973; that Francis went through the Union's  
 20 apprenticeship program in the early 1990s, he has worked alongside of Francis in the field in metal applications, and Francis, who is now an instructor in the apprenticeship program, is a good insulator; that Noble went through the Union's apprenticeship program about 30 years ago, he has worked with Noble using sheet metal in insulation applications, and Noble is a good metal man; that Gooch is a second or third year apprentice; and that previously he had worked  
 25 at the Autaugaville power generating facility. On cross-examination Weldon testified that he has not worked for a nonunion contractor since he became a member of the Union about 30 years ago; that when he applied for a job at GBIC he was not employed; that he worked for M&D at the Autaugaville site and GBIC was not on the site at the time; that he never called GBIC back to see if any jobs were available; that he would have taken a helper job at \$8 an hour; and that  
 30 when Marsh was told to turn off the video camera he left it on but he set it down on a table. Subsequently Weldon testified that he did not remember seeing the notice on the application that it would be retained for 30 days; and that the two Hispanic gentlemen who were in the office when he and the other Union members entered were sent to the Autaugaville jobsite.

Newsome, who is a business representative of the Sheet Metal Workers Local 48, testified that he started his apprenticeship program in 1977 and became a member of the Sheet Metal Workers in 1979; that as part of his job he tries to organize contractors; that he has  
 35 worked at several power plants, including the Miller Steam Plant where he was hired as a sheet metal worker and became the general foreman supervising the sheet metal and insulation work; that he has experience installing (a) sheetmetal over insulation, (b) panel insulation, and (c)  
 40 insulation which is going to have sheet metal installed over it; that he applied for work with GBIC, and General Counsel's Exhibit 7 is his application; that he met with some of the members of the asbestos workers before he applied at Respondent's Decatur office with Beasley, who is a full time organizer for the Sheet Metal Workers; that Beasley successfully completed the  
 45 Sheet Metal Worker's apprenticeship program around 1996; and that Decatur is approximately 50 miles north of Birmingham, and it takes one hour and twenty minutes to drive from Birmingham to Autaugaville, which is south of Birmingham. On cross-examination Newsome testified that he has not been out of work in the last two years but during that period he did apply  
 at four or five non-union contractors; that he was hired by one, CLP working for R. J.  
 50 Mechanical, he worked one day, and then quit after he was able to get employees to sign up to join the Sheet Metal Workers; that the previous work experience portion of his application for employment at GBIC is fictitious; that he and Beasley did not wear any union paraphernalia and

to his knowledge GBIC did not know that they were members of a union; and that it was planned that he and Beasley would go into GBIC's Decatur office and apply for jobs on January 14 after the insulators went in and applied.

5           The Respondent called Beasley as a witness at the trial herein. He testified that he has been a member of the Sheet Metal Workers for a little over 12 years, and he has been a full-time organizer for Sheet Metal Workers Local 48 for a little over a year; that in the year before the trial herein he had also been employed at several named companies; that when he went to the Decatur office of GBIC on January 14 he was not employed anywhere other than  
10           the Sheetmetal Workers; that some of the information he gave on the previous work experience portion of his application for employment at GBIC, General Counsel's Exhibit 9, is not true; that he recorded what was said when he went to GBIC's Decatur office on January 14 and there is nothing on the recording which indicates that anyone at GBIC made any comments about not hiring union members; that he did not wear anything on January 14 which would indicate that he  
15           was a union member; that he was asked by the insulators to apply at GBIC; and that it was planned that one group would go in overtly and then he and Newsome would go in covertly. Beasley also testified that he has worked at nonunion sheet metal jobs during the year before he testified herein.

20           The Respondent called Francis as a witness at the trial herein. He testified that on January 14, when he applied for a job at Respondent he was employed by Performance Contractors (PCI); that PCI paid \$18.93 an hour plus health insurance and pension; that Donald Stanley of the Union called him and asked him to apply at GBIC; that he has been in the Union since 1991; that he has worked for non-union contractors, namely Trinity Contractors in 1998 or  
25           1999 and Star Insulation in 2001; that General Counsel's Exhibit 3 is the application he submitted to GBIC; that most of his work is on power generation plants; and that he has been a journeyman since 1996.

30           The Respondent called Gooch as a witness at the trial herein. She testified that when she went to GBIC's Decatur office on January 14 to submit an application for employment she was employed at the time by Shook and Fletcher making \$13 an hour but that job ended a few weeks after January 14; that she was trying to line up a job for after she was laid off at Shook and Fletcher; that she has worked in the insulation industry for three years as an apprentice; and that she never called GBIC to find out whether she had been accepted for a job because  
35           the secretary told her on January 14 that GBIC had filled the last two positions, her application would be turned over to human resources, and she might hear from human resources.

40           The Respondent called Noble as a witness at the trial herein. He testified that he has been a member of the Union since 1977; that when he went to GBIC's Decatur office on January 14 he was not employed; that he has worked as an insulator for 25 years, he is a journeyman, and he has worked at a lot of jobs on power generation sites; and that at the last job he worked before applying at GBIC he made the contract rate of \$18.53 an hour with benefits. Noble's application, General Counsel's Exhibit 6, does not list any work experience after 1993.

45           Miguel Aguilar, who has been a member of Insulators Local 73 in Arizona since 1995, has worked in about 10 power plants.<sup>4</sup> He is an organizer with the Insulators International Union. Pages GBIC 287 through GBIC 301 of General Counsel's Exhibit 16 are the application

50           <sup>4</sup> His Arizona drivers license, page GBIC-317 of General Counsel's Exhibit 16, has his full name, viz., Miguel Angel Guzman Augilar.

and documents relating to the application he filled out at the Respondent's Decatur office on January 14. Pages GBIC 302 to GBIC 317 of the same exhibit are documents relating to the application and the application he filled out at the Respondent's Tonopah, Arizona job on October 21, 2002. Aguilar testified that he was hired by the Respondent at Tonopah that same day; that Ryan Hawkins worked at the Tonopah job in October 2002; that during the application process and during his employment at Tonopah, he did not disclose to management that he was affiliated with the Union; that as soon as he walked out on the Tonopah jobsite he handed out his Union business card, page GBIC-318 of General Counsel's Exhibit 16, and Union flyers, General Counsel's Exhibit 17, to the employees<sup>5</sup>; that he did not give his business card to anyone in supervision or management; that when he worked at the Tonopah jobsite he used his cellular telephone in the presence of Ron Hawkins; that one of the employees at the Tonopah jobsite, Harold Hamman, wore a Union T-shirt one day and he was terminated later that day; that the project manager on the Tonopah job, Ron Davis, told him that Hamman was terminated for using a cell phone while on the jobsite; that Davis asked him if he knew whether Hamman was union; that two days after Hamman was terminated he attended an employee meeting; that Hawkins also attended this employee meeting; that during the meeting one of the employees' cell phone rang and the employee told the caller that he would call right back; that the employee who received the cell call during the employee meeting continued to work for GBIC; that before applying at GBIC on January 14 he had lunch with Bill Lemus, Donald Stanley, who is the Local's business manager, and Union members at a restaurant near GBIC's Decatur office; that when he went to GBIC's office later that day the secretary was writing "at this time we're not accepting applications" with a black marker on an 8.5 inches by 11 inches piece of paper and she asked him if he spoke Spanish and if he could translate it for her into Spanish; that he wrote it out in Spanish on another piece of paper, after consulting with an individual who was there and could write in Spanish; that the secretary then asked him if he did any metal work and when he replied that he did she telephoned someone and gave the telephone to him; that Hawkins was the person the secretary telephoned and Hawkins asked him how many guys were with him; that he told Hawkins that he had 10 guys; that Hawkins asked him if he had done metal work in power plants; that when he told Hawkins that he had Hawkins asked him if he could be at the jobsite the following day; that he explained to Hawkins that he could but the other guys would not be there until Monday; that Hawkins told him that the secretary would give him an address to take a drug test and he should be at the jobsite at 6 a.m. the next morning; that the secretary then placed the two signs on the door coming into the office; that the secretary then gave him the directions to the location where the drug test would be administered and to the jobsite; that while he was in the Decatur office he did not disclose that he had previously worked for GBIC; that no one asked him if he worked for GBIC before; that he did not tell Hawkins that he had worked for him in Arizona; and that no one told him that the reason he was hired at the Autaugaville job was because of his previous employment with GBIC in Arizona.

On cross-examination Aguilar testified that he is a paid union organizer; that on January 14 he was acting as a covert salt when he applied at GBIC; that it was his purpose to

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<sup>5</sup> As here pertinent, the card reads:

**MIGUEL AGUILAR**  
**ORGANIZER**  
**LOCAL NO. 73**

**INTERNATIONAL ASSOCIATION OF HEAT & FROST**  
**INSULATORS & ASBESTOS WORKERS**

The Union flyers, which are in English and Spanish, collectively describe Sections 7 and 8(a)(1) and (3) of the Act, specify 35 things an employer cannot do, and describe what the Union could do.

demonstrate that he could get hired when the overt salts did not get hired; that no member of management said anything to him at the Tonopah job about his union activities; that he worked at the Tonopah job about 12 days, and he left the job because he had a family emergency when his wife's grandmother, who lived in Mexico, died; that when he returned from Mexico he received a telephone call from GBIC indicating that he had missed too much time, about two weeks, and he no longer had a job with GBIC; that when he left he told GBIC that he had a family emergency and he did not know when he was coming back; that he did not mention Hawkins' name to the secretary in GBIC's Decatur office on January 14 and he did not tell her that he knew Hawkins; that the secretary telephoned Hawkins and told him that she had "a metal guy here for you" (transcript page 239); that Hawkins asked him what type of experience he had; that Hawkins asked him if he had metal tools; and that he did not tell Hawkins that he had worked for GBIC in the past.

Jennifer Anders, who works as an accounts payable clerk and does a lot of the reception work at GBIC's Decatur office, testified that she makes sure that applicants show the proper identification, fill out the application as best they can, and she makes sure that all of the tax forms are filled out; that she places the applications in the top of four trays where they are rotated downward weekly and discarded after 30 days when they are in the bottom tray; that the applications indicate that GBIC will only keep them for 30 days; that no one in particular reviews the applications for purposes of determining whether to hire an applicant; that she reports to Wright and she has never given the applications in the trays to Wright nor has she seen Wright review the applications; that Aguilar specifically asked to speak with Hawkins; that she telephoned Hawkins twice because she did not get him the first time; that in the interim she asked Aguilar for his help in translating into Spanish a sign indicating that GBIC was not accepting applications at that time; that both the English and Spanish versions of the sign were up on January 14; that when she got Hawkins on the telephone she gave the phone to Aguilar; that the English version of the sign is put up when all of GBIC's positions are full, it was put up one time in December 2002 and it was posted again in January 2003; that when the sign is up applications are still accepted; and that some of the individuals who fill out applications at the Decatur office are rehires who are sent there by supervisors to fill out an application so that GBIC will have current information on them. On redirect Anders testified that she does not telephone a supervisor at the jobsite unless an applicant asks to speak to a specific supervisor.

Hawkins, who is an Estimator and Project Manager for GBIC, testified that since his hire in January 2002 he has worked at four jobsites for GBIC, including Tonopah, Arizona, and Prattville (Autaugaville), Alabama; that he reports to Wright; that he was the project manager in Tonopah and Aguilar was an employee of GBIC there; that Aguilar was a good employee who had a lot of the right tools; that when Aguilar was at Tonopah he did not know that Aguilar was a union organizer or supported the Union during that time; that before the charge was filed by the Union against GBIC, he had no idea that Aguilar was a union organizer; that while he was at Tonopah he did not know that GBIC employee Hamman was a union organizer or supported the Union in any way; that Hamman was terminated at Tonopah because the employees had been told that they were to keep cell phones in their lunch boxes and use them only on breaks, Hamman was using his cell phone during a non-break time, he approached Hamman and told him that he was not supposed to be using his cell phone in the field during a non-break period and this would be his only warning, Hamman said "you don't have to talk to me like a fucking kid, you can just fucking fire me if you want to" (transcript page 377), and Hamman was terminated for insubordination; that he did not notice whether Hamman had on any union insignia or union paraphernalia; that he did not remember any meetings after Hamman's termination where people laughed about the cell phone policy; that it was GBIC's own cell phone policy at Tonopah; that at Tonopah Aguilar asked for an extended weekend (Thursday through Monday) because someone on his mother's side in California had passed away but

Aguilar was gone for two weeks; that when Aguilar subsequently telephoned him he told Aguilar that GBIC's client, Shaw Constructors, had placed a limit on the number of employees GBIC could have on the site and he could not bring Aguilar back; that he was transferred to the Autaugaville jobsite in December 2002; that at Autaugaville he was responsible for calling Wright and other divisions and superintendents with respect to staffing; that if GBIC employees are running out of work at one site GBIC tries to find work for them at another site; that when he needs people he calls other superintendents at other jobsites; that other superintendents also call him when their jobs are winding down and they looking for another jobsite to send the GBIC employees; that if he was unable to get employees through his contacts, he telephones Wright; that he did not recall hiring anybody off the street for a position at the Autaugaville site; that all the employees at Autaugaville were referrals or transfers except for William Carrera; that around January 14 he was not actively searching for employees for the Autaugaville site but he did need a shop man, who does a lot of the metal work for the other mechanics; that on January 14 while he was at Autaugaville he received a telephone call from Anders who told him that she had a gentleman who wanted to speak with him; that the man identified himself as Angel Guzman and he asked if GBIC was hiring; and that

I said ... have you ever worked for GBIC before, and he said he had, and I said, well, at which site. And he just fumbled around, and said, oh, I don't remember who I worked for, et cetera, I said, you don't remember anybody's names, He said, no. I said, well, what kind of tools do you have.

Just to kind of get an idea of what kind of a mechanic he was, and of course, he listed a rather long list of tools, which means he probably knows what he talking about, if he's actually got them. Well, in order to verify he actually has them, I told him , well, if you can be here tomorrow, we'll take a look at you, can you come down tomorrow and he said he will. And I said, well, let me talk to Jennifer, I'll make sure she gets you a map on how to get there, et cetera, He put Jennifer back on the phone. [Transcript pages 384 and 385]

Hawkins further testified that he told Anders to give Guzman directions, send him to get drug screened, have him fill out the application, and get copies of the ID since he was going to bring him the next day; that it is common for GBIC to send people for drug screens before they are hired; and that he never asked Aguilar if he had any mechanics available to work for GBIC. On cross-examination Hawkins testified that he did tell Guzman during his telephone conversation with him that the wage rate for mechanics was \$12 an hour; that he has never come across an instance where GBIC would pull an application out of the massive stack of applications they have to hire somebody who does not have a referral; that to his knowledge there is no written policy regarding the referral system; that "[y]es sir" Hamman was the only employee cited under the cell phone policy at Tonopah (Counsel for General Counsel's question); and that GBIC adheres to its referral policy so that it can keep good employees, "the ones you trust" (transcript page 404).

On rebuttal Aguilar testified that on January 14 there was no sign on the door of GBIC's Decatur office when he went in; that while he was in the office he saw the secretary put the handwritten English sign up; and that when he spoke with Hawkins on the telephone that day Hawkins asked him if the other employees coming to work with Guzman do metal work and he told Hawkins that they did.

Wright, who oversees all aspects of the day-to-day business out of the Decatur office, testified that at Autaugaville GBIC had helpers, insulators, mechanics, foremen, a superintendent, a project manager, and clerical and safety personnel; that GBIC's manpower

needs fluctuate on a job based on the number of releases to install insulation GBIC receives from its client; that it is one of his duties to insure that the proper manpower level is maintained; that to get people to work on a GBIC job it relies on the transfer of people from site-to-site, rehires and referrals from GBIC supervisors or mechanics; that the same people are utilized over and over again; that GBIC has used this policy as long as he could remember, and this is a common industry policy<sup>6</sup>; that transfers, referrals and rehires complete new paperwork when they go to a jobsite to make sure GBIC has the latest information; that using the above-described system he did not have any problems meeting the labor needs of the Autaugaville job; that superintendents always want more people to make the job go faster; that he delays staffing for various reasons; that if GBIC has 20 people on site, he wants to keep enough releases available to keep the 20 people busy for at least two weeks; that he never hires anyone over the telephone; that someone is not considered hired until the person has completed an application, a drug screen, a jobsite interview, orientation, and the project manager or supervisor fills out the hire form; that at Autaugaville there was an additional step in that Southern Company also had a screening process to check whether the individual was on a list of people who are barred from a Southern Company site for various reasons; that all of the people hired for the Autaugaville job were transfers, rehires, or referrals, except for Carrera; that from the time the Autaugaville project started up until the time he testified at the trial herein, GBIC had received about 800 applications from people walking in off the street into the Decatur office, and none of these applicants were hired<sup>7</sup>; that since he has been a contracts manager he has not hired anyone who walked in off the street to submit an application; that such applications are discarded after 30 days; that he has never hired anyone who previously made more than GBIC's top rate and paid them the higher rate they were previously receiving; that he does not hire people with pay rates significantly higher than GBIC's because he does not

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<sup>6</sup> Wright has worked for six or seven different insulation companies since he started in the industry in 1989.

<sup>7</sup> Wright sponsored Respondent's Exhibit 12 which he testified are the numerous applications received at GBIC's Decatur office from people who were not hired from 30 days before GBIC received the National Labor Relations Board (Board) charge, which was about January 22, up until sometime in 2003 as indicated by the date on the last application submitted during the involved period. Subsequently the Respondent stipulated that four of the individuals with applications in Respondent's Exhibit 12 were in fact hired and worked at the Autaugaville job site, General Counsel's Exhibit 21. They are Manuel Aldana, Cecilio Natividad, Luis Fernandez Aldama, and Sandro Moreno. The applications of Victor Rodriguez, Pedro Vargas, Luis Casverantes, Lucino Palacios were received as General Counsel's Exhibits 22 through 25. At the continued hearing on September 10 Wright sponsored additional applications of individuals who were not hired by GBIC, Respondent's Exhibit 16, which applications were found in the interim between the first session and the continued hearing. Wright was not sure if all of these applications were submitted in the Decatur office. Wright testified that Moreno has worked for GBIC for quite some time at several different job sites, including Autaugaville, Respondent's Exhibit 19; that Moreno transferred from GBIC's Henderson, Kentucky job to Autaugaville; that Moreno was not hired off an application submitted in the Decatur office, GBIC 1631 of Respondent's Exhibit 12; and that with a transfer, rehire, or referral he does not consider the completeness of the application. Counsel for General Counsel introduced (1) the time sheet for the Autaugaville job for the week ending January 19, General Counsel's Exhibit 30, (2) a print out of a payroll record for Cecilio R. Natividad showing that he was hired by GBIC on February 3, General Counsel's Exhibit 31, (3) a print out of a payroll record for Sandro Moreno showing that he was hired by GBIC on January 13, General Counsel's Exhibit 32, and (4) the time sheet for the Autaugaville job for the week ending January 26, General Counsel's Exhibit 33.

believe that they will be a happy and productive employee; that during the life of the Autaugaville project he never had any difficulties in hiring insulators or mechanics through GBIC's referral, transfer, and rehire system; that he has never hired an insulator making \$13 an hour for a helpers position; that it is GBIC's policy to terminate employees who lie on company documents and forms, including applications; that he did not place an ad in the newspaper for the Autaugaville project; that when he saw an ad in the Decatur newspaper for a GBIC job he telephoned the number given and found out that it was for a GBIC job in El Dorado, Arkansas; that GBIC has hired union members at International Paper in Portland, Alabama, at its Chattanooga, Tennessee facility, and he believed at its Noonan, Georgia facility; that he was able to meet all of his manpower needs at the Autaugaville site using transfers, rehires, and referrals because the manpower needs at other GBIC sites such as Ashland, Mississippi, Eldorado, and Nashville, Tennessee, were declining and employees could be transferred to the Autaugaville site; that on January 14 he told the union applicants that GBIC was not a union shop, it was an open shop company; and that GBIC does not have a policy of not hiring people because they are in the union.

On cross-examination Wright testified that he checked the prior performance at GBIC of some of the employees who he sent to the Autaugaville site but he could not remember which employees he checked on; that Hawkins needed authorization from him to hire employees at the Autaugaville site; that he did not have a conversation with Hawkins while Aguilar was in the Decatur office (As noted above, when he was in GBIC's Decatur office Aguilar identified himself as Angel Guzman.); that in January 2003 the Decatur division had eight projects; that individual hires at these eight jobsites did not have to be cleared through him but he makes the staffing decisions based upon releases; that the managers at the sites do not have to call him with every name that they want to place on the site; that he did not have any personal involvement in the hiring of Aguilar; that GBIC intends to consider applications from people who walk in off the street in the event that GBIC needs to but since he has been with the company it has been able to fill its hiring requirements at the Decatur office from either rehire, or transfer, or referral; that he has been in the Decatur office since July 2000; that he is the one who decides whether a sign is placed on the door regarding whether GBIC is taking applications; that even when the sign is up applications are accepted; that the sign is up only some of the time but he has never told the secretaries to take down the sign; that the sign was probably first put up in 2002; that the directions to the Autaugaville site were generated by Southern Company; that he never reviewed any of the applications in Respondent's Exhibit 12 for the purpose of considering them for employment; that he never reviewed the applications of the alleged discriminatees for the purpose of considering them for employment; that the applications of transfers or rehires are not checked unless there is some doubt whether the applicant did in fact work for GBIC before; that referrals are checked in that the person who made the referral is contacted but the employers listed on the application are not checked; and that he did not know of anybody that has been hired off the street to work somewhere in the Decatur division other than Carrera.

At the continued hearing on September 10 Wright testified that Respondent's Exhibit 15 is a summary of all of the employees who worked at the Autaugaville jobsite; and that the summary provides (1) the job and employee number, (2) the name of the employee, (3) the start and end week of employment, (4) the pay rate, (5) the classification, (6) if applicable, the name of the person who referred the employee, (7) the GBIC job the employee was transferred from, and (8) whether the employee previously worked for GBIC. On cross-examination Wright testified that he did not recall that the staffing level dropped substantially shortly after the union members applied at the Decatur office on January 14; that according to Respondent's Exhibit 15 collectively for the weeks ending January 19 and 26 a number of employees were no longer

employed at the Autaugaville job<sup>8</sup>; that he did not recall that there was another group of employees who also left the job during the week of January 26 but later returned to Autaugaville so that their end week is shown sometime in March 2003; and that additional employees left the Autaugaville jobsite on January 26 and returned later.<sup>9</sup> On redirect, Wright testified that if an employee does not have vacation time and he leaves to attend to a family matter, he is then designated as quitting; that it is common on job sites for employees to leave for short periods of time and then return to work; that employees on the Autaugaville jobsite were transferred to jobsites in New Orleans and North Carolina; that employees were transferred back to the Autaugaville jobsite; and that Respondent's Exhibit 20, which is a print out of paycheck history by employee shows, inter alia, that employees Sylvester Hernandez, Walter Jimenez, Abiaser Hernandez, Ponciano Hernandez, and Luis Fernandez Aldama did not have a hiatus in their pay or any period when they were not paid for each week.

At the continued hearing Hawkins testified that Luis Fernandez Aldama, who was a transfer from GBIC's Ashland, Mississippi job, worked with him in Prattville (the Autaugaville jobsite) and referred some employees to work at the Autaugaville site, namely Sandro Moreno, Manuel Aldana, and Cecilio Ramos Natividad; that Moreno had been employed by GBIC in the past; that he was not aware that Moreno had previously submitted an application in GBIC's Decatur office, he did not hire him based on that application, and he hired Moreno based on the referral of Luis Fernandez Aldama; that German Salido was employed by GBIC through Superintendent Jerry Matthews, who shared an apartment with Salido; that employees Ponciano Hernandez and Abiaser Hernandez were brought back to the Autaugaville jobsite to finish up the last system, which was released to GBIC the last minute; that Natividad and Aldana left work because Moreno left, they lived together, Moreno drove them to and from work every day; that Moreno had to leave work for personal reasons; and that Natividad and Aldana returned to work at GBIC and they did not have to go through the application and rehire process. On cross-examination Hawkins testified that Luis Fernandez Aldama was not a superintendent but rather an employee of GBIC; that Luis Fernandez Aldama was referred by supervisor Ubaldo Serrato; that Luis Fernandez Aldana had been working for about one week when he referred the other aforementioned individuals for employment; and that Abiaser Hernandez was laid off when the job was staffing down but when another system was released to GBIC in about May 2003 some of the employees were brought back.

At the continued hearing Superintendent Serrato testified that he worked at the Autaugaville job site from December 1, 2002, and he was working at that job site when he testified at the trial herein; and that Fernando Luna, Ulises Lopez, Juan Sanchez, and Baltazar Dominguez worked at the Autaugaville job site, and they were hired after a scaffold bander recommended them to him.

On January 15 Aguilar went to the Autaugaville power plant job site. He testified that he spoke with Matthews, who was entering Respondent's job trailer at the Autaugaville jobsite; that

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<sup>8</sup> Rene Alvarez, Luis Vargas, Alonso Salucio, Pedro Vargas, Francisco Vargas, Gaspar Domingo, Nhasario Marcos, Victor Perez, Julio Martinez, Manuel Gonzalez, Ramiro Lamdrid, Francisco Santos, Julio Andres, Evencio Garcia, Francisco Martinez, Jose Moncada, Mario Brito, William Carrera, Sinue Armenta, Lucino Palacios, Sergio Orozco, Martin Tejeda, Andres Gutierrez, Manuel Vargas, Sergio De La Trinidad, Sam Watson, Efrin Sanchez, Guadalupe Rangel, Azel Ramirez, Gilberto Avila, David Trejo, Mauricio Vidal, Mateo Ramirez, Daniel Gomez, Jaime Rodriguez, Diego Jimenez, Ponciano Hernandez, and Lorenzo Rodriguez.

<sup>9</sup> Luis Fernandez Aldana, Manuel Fernandez Aldana, Gabino Barahona, Ponciano Hernandez, Abiaser Hernandez, Jose Alfredo Jinenes, Walter Jimenez, and Hector Vega.

he watched a safety video and then went back to the trailer and spoke with Matthews who asked him to sign for the safety rules and rules of the power plant; that one of the rules of the plant indicated that cell phones were not allowed at the jobsite; that he asked Matthews if he should put his cell phone in his car and Matthews told him that he did not have to, he would all right as long as no plant people saw him using his cell phone, and if he was going to use the cell phone all he had to do was go to the restroom where no one could see him; and that he told Matthews that the day before he translated a sign for the secretary and Matthews said that

there was a big commotion going on over there at the office yesterday because the union come over there with shirts and they had cameras and was trying to get hired on, and he said, we're a non-union company, we don't hire non-union, you know, people here.

Q. He said, we don't hire non-union people?

A. We don't hire no union people here.

....

then he kind of stopped and grinned at me, and he goes, you ain't no Union spy are you.

Q. Did you respond to the question?

A. Yes I told him I wasn't. [transcript pages 194 and 195]

Aguilar further testified that Matthews said that there were supposed to be 10 men and he wanted to know where were the others; that he told Matthews that they would be there Monday; that subsequently while he was sitting in the job trailer Hawkins came in and he said "you're that union guy from Arizona, you're not going to pass out all your business cards or any handbills here are you" (transcript page 196); that he told Hawkins that he was not and he came to Autaugaville to work; that Hawkins asked him why he did not tell him on January 14 that he was the guy from Arizona and he told Hawkins that he did not ask him that; that after Matthews and Hawkins talked Matthews escorted him with his tools to where the Respondent kept its tools; that he waited there for a while and then he received a call from Lemus on his cell phone; that he went into the restroom and talked on his cell phone; that when he came out of the restroom Matthews was there and Matthews said "you know the rules, get your tools" [transcript page 197]; and that he went with Matthews to the job trailer where Hawkins was already filling out page GBIC-282 of General Counsel's Exhibit 16, which is a termination report.<sup>10</sup>

On cross-examination Aguilar testified that he brought a tape recorder to the Autaugaville jobsite; that there was nothing on the recording about Matthews telling him that he was free to use the cell phone on the jobsite; that the tape recorder given to him by the Birmingham "guys" was old and after it recorded some "stuff" it stopped; that the alleged statement of Hawkins that he, Aguilar, was the Union organizer out of Arizona is not on the tape because the tape was only a 60 minute tape, he arrived at the jobsite at 5:45 a.m., and Hawkins arrived more than an hour after that; that he met with Hawkins in the office trailer after he had been through orientation; that he told Matthews that he had worked for GBIC in the past and he knew Hawkins; that he told Matthews that he was getting bad coverage with his cell telephone;

<sup>10</sup> The remarks section of the report reads "Violating S.C. Power's cell phone Rule by employees in the field."

that he was sent down to the shop after he met with Hawkins; that after he was given his termination report at Autaugaville, GBIC-282 of General Counsel's Exhibit 16, Hawkins told him that he was a good shop man down in Arizona and he was going to be a shop man at Autaugaville but the same thing happened to him as happened to his buddy Hamman; that Hawkins's alleged reference to Hamman is not in his affidavits and just recalled Hawkins' statement when he testified at the trial herein; that the "Port-a-John" that he used for the cell telephone conversation was right next to the shop; that when he spoke with Lemus on the cell telephone he told him "hey, I think they found out who I am" (transcript page 252); and that before he left the Autaugaville jobsite he spoke with some of the employees giving them his telephone number.

Matthews, who at the time of the trial herein was not employed by GBIC, testified that he was employed by the Respondent from December 14, 2002 through May 18; that he was the Superintendent at GBIC's Autaugaville job; that he was hired by Wright; that he has been to GBIC's Decatur office and he has seen a sign in the window about not taking applications; that he first met Aguilar, who was using the name of Angel Guzman at the time, just before 6 a.m. on January 15 at GBIC's office trailer at Autaugaville; that he took Guzman and four other workers to Southern Company's training trailer to watch a safety orientation film and to get some paperwork done; that the four other workers were GBIC employees who had transferred from Georgia Power to Autaugaville and they were required to take a drug test that morning; that Southern Company did a background check on them before letting the four workers go to the plant to work; that with respect to Guzman, he had to wait for Hawkins to write a letter on GBIC's letterhead indicating that Guzman had passed his drug test and give his social security number so Southern Company could do a background check on Guzman; that he and Guzman waited in the office trailer for Hawkins; that while they waited he told Guzman that Southern Company has a policy that cell phones and cameras are prohibited in the field, there were no warnings, it was a one-shot deal, and if he got caught with a cell phone he was out of there<sup>11</sup>; that there was an exception to the policy in that the Respondent's management was allowed to have cell phones on the jobsite; that he did not recall whether or not he showed the written policy to Guzman; that Guzman told him that he had a telephone and he showed it to him; that he told Guzman if he got caught with it he was gone, and Guzman said that he could not get a signal there and he would put it in his car when he went to get his tools; that a few moments later Ryan came into the trailer and when he saw Guzman he said "Miguel, what are you doing here" (transcript page 308); that when he told Ryan that the man's name was Angel Guzman, Ryan said no this is Miguel Aguilar and he asked Guzman why he did not tell him who he was; that Ryan typed up the letter to get Aguilar out in the field; that he brought the letter to James Nelson, who made sure the employee had a drug screen and ran the social security numbers for Southern Company to check for any problems; that he did not tell Aguilar not to worry about using a cell phone, or that he could use it as long as Southern Company did not see it or that he could hide in the portable bathroom and use the cell phone; that he did not ever hear Hawkins make any comment about Aguilar being a union supporter or that Aguilar should not start any of the union stuff he did in Arizona; that he sent Aguilar to the shop, which was 250 yards from the

<sup>11</sup> Respondent's Exhibit 10. The letterhead on the document is M&D Power Constructors, Inc., Industrial Construction and Maintenance Specialists. The document is dated January 9. As here pertinent, it reads as follows:

From this day forward the use or possession of cameras is prohibited.

All cell phones and their use is prohibited on site, leave them in your vehicle if you must bring them to work.

If you are caught with either of the items in your possession on the project work site you will be terminated. This will be the only warning. [Emphasis in original]

trailer, at 8:50 a.m.; that at 9 a.m. foreman Eric Murray came to the trailer and asked where was the guy who was sent to the shop; that at 9:15 a.m. Murray called him on the radio and indicates that he still could not find Aguilar; that he went to the shop area and was told that Aguilar was in the bathroom; that as he approached the "Port-a-Lift" he could hear Aguilar talking; that  
 5 subsequently Aguilar came out of the bathroom with a cell phone in his hand, and he told Aguilar to get his tools and come to the trailer to get his termination report; that Aguilar did not protest in any way; that he filled out the termination report, made a copy of it, and gave it to Guzman, page GBIC-282 of General Counsel's Exhibit 16; that at that time he did not know that Guzman or Aguilar was a union supporter, a union organizer, or affiliated with the Union; that he  
 10 was involved in the hiring process at the Autaugaville site; that when he was looking for help he telephoned other superintendents with GBIC; that Wright would send people out from the Decatur office who were transferred; that he hired one person off the street, namely Carrera, when some of M & D's scaffold hands asked that he be hired; that M & D is a union company, it was giving GBIC trouble, and he viewed the hiring as an opportunity to promote harmony on the  
 15 job; that he recommended that Murray, who was his traveling partner, be hired; and that other than Carrera, he did not hire anyone on the Autaugaville site who was not a referral or a GBIC transfer.

On cross-examination Matthews testified that he was not employed when he testified at the trial herein; that Guzman was referred by Hawkins; that he was short of people when Guzman came to the Autaugaville site, and Wright was made aware of this; that Wright told him that he had employees on a job in Mississippi who would be transferring to Autaugaville; that within a few days after Guzman was at Autaugaville, GBIC moved a number of employees off the Autaugaville job to other sites when GBIC had a material problem there; that GBIC  
 25 employees at the Autaugaville site worked overtime at that time; that he heard about people who applied for work at the Decatur office wearing union shirts several weeks after it happened, from the man who brought him materials; that he had never had another employee with a cell phone at the Autaugaville site; that he was using his cell phone to check voice mail in his office when he discussed the cell phone policy with Aguilar; that Aguilar came out of the bathroom at  
 30 9:20 a.m.; that the Autaugaville job involved a conventional system of insulation and sheet metal over it; that he viewed the application as a nuisance; and that he and Hawkins set the pay rate for the helpers, insulators, and mechanics.

Hawkins testified that on January 15 he arrived at the Autaugaville site between 8 and 8:30 a.m.; that when he saw Aguilar he asked him what he was doing there; that Matthews said that it was not Miguel but rather Angel Guzman; that when he asked Aguilar why he did not tell him the day before that it was him Aguilar said that he did not know; that he told Matthews that Aguilar was the shop man at the Arizona site and they needed a shop man at Autaugaville; that he then did the paperwork for Aguilar indicating that he was an employee of GBIC, he had a  
 40 drug screen, and giving his social security number; that he also filled in the hire form for Aguilar, GBIC-284 of General Counsel's Exhibit 16, which is dated January 15; that after Southern Company checked the information provided on Aguilar, he was sent to the shop; that subsequently Matthews told him that Aguilar was being terminated for talking on his cell phone; that he told Aguilar that he knew the rules and he asked Aguilar why he was on the phone; that  
 45 Aguilar said that he did not know; that Aguilar did not protest his termination or try to give any excuses; that at the time he did not believe that Aguilar was a union organizer or a union supporter and Matthews did not indicate that either was the case; that there was no union organizing activity at the Autaugaville site; that he never asked Aguilar whether he supported the Union or not; that on January 15 he did not know that Union members had submitted  
 50 applications in Decatur the day before; that GBIC's customer, Southern Company, had given GBIC the cell phone policy, Respondent's Exhibit 10, and indicated that the policy was to be adhered to; that he never told Aguilar that he was the union guy from Arizona and he should not

be passing out union cards or flyers at the Autaugaville site; and that he never told Aguilar that he was being fired for the same reason as Hamman or that he would have been a good shop man but the same thing happened to him as happened to Hamman. On cross-examination Hawkins testified that on January 15 GBIC needed people who had metal working skills at the Autaugaville site.

Jesus Alcaraz testified that he saw an advertisement for insulators in the Decatur Daily, and on January 15 he telephoned the number given; that the ad did not indicate that GBIC was involved; that when he telephoned the number given he was given another telephone number to call; that the other telephone number was GBIC; that when he telephoned GBIC he spoke with a man he identified only as Ryan; that Ryan told him that GBIC was hiring and it needed 10 to 12 people by the next day at the jobsite, which was near Prattville; that Ryan asked him how much experience he had and if he had any friends he could bring to the job; that Ryan asked him if he had worked for GBIC before, and he told Ryan that he had; that Ryan asked him about his tools; and that he did not go to work for GBIC in Autaugaville. On cross-examination Alcaraz testified that Ryan told him that he was looking for insulator mechanics (metal men), and Ryan told him that the rate was \$12 an hour without per diem.

On cross-examination Hawkins testified that he did not recall having a conversation with Alcaraz; that he has not been called in response to an ad; and that he has heard that GBIC advertises in the newspaper for employees.

Wright testified that on or about January 23 he received an unfair labor practice charge involving GBIC's Tonopah job, Respondent's Exhibit 14; that he subsequently contacted his site superintendent on the Tonopah job, Davis, and during their second telephone conversation Davis informed him that an employee had given him Aguilar's business card; that he had Davis fax Aguilar's business card to him in Decatur and he placed it in Aguilar's file; that prior to this he never had any indication that Aguilar supported a union; and that prior to receiving the charge he did not tell Hawkins or Matthews about the union members who applied in Decatur.

### Analysis

The problem with General Counsel's case, except for paragraph 9 of the complaint alleging failure and refusal to consider for hire or hire, is that it relies solely on the testimony of Aguilar, who as noted above is a full-time union organizer, and, therefore, has an interest in the outcome of the case. Even with respect to paragraph 9 of the complaint, General Counsel's case relies in great part on the testimony of Aguilar to establish antiunion animus. To believe Aguilar one would have to disbelieve the testimony of Hawkins, Matthews, who no longer works for the Respondent, and Anders to the extent their testimony conflicts with that of Aguilar. I did not find Aguilar to be a credible witness. In my opinion he was not interested in telling the truth under oath. Rather, he was more interested in building a case against GBIC, and he was willing to lie under oath to do it. I do not credit any of Aguilar's testimony unless it is corroborated by a reliable witness or reliable documentation. To the extent that the testimony of Anders, Hawkins, and Matthews conflicts with the testimony of Aguilar, the testimony of Anders, Hawkins, and Matthews is credited, and the testimony of Aguilar is not credited.

The reason that Aguilar used the name Angel Guzman and he testified that (1) he did not ask Anders to speak with Hawkins, (2) no one asked him while he was in Decatur if he worked for GBIC before, (3) he did not tell Hawkins that he had worked for GBIC in the past, and (4) no one told him that he was hired at Autaugaville because of his previous employment with GBIC in Arizona, is that he was trying to demonstrate that he could get hired at Autaugaville without being a prior employee of GBIC. Anders' testimony that Guzman asked to

5 speak with Hawkins on January 14 is credited. Hawkins' testimony that he asked Guzman on January 14 if he had worked for GBIC before is credited. Hawkins asked on January 14, and Hawkins recognized Guzman ne Aguilar on January 15 as a prior employee of GBIC before Hawkins filled out the necessary paperwork to see if Southern Company would allow Aguilar to work on that jobsite.

10 Paragraph 7 of the complaint alleges that Matthews at GBIC's Autaugaville job site interrogated employees about their union activities. Matthews testified that he did not hear about what happened on January 14 at GBIC's Decatur office until several weeks later. His testimony is credited. Consequently, Matthews would not have been in a position to tell Aguilar on January 15 what happened on January 14 in GBIC's Decatur office. Additionally as often happens when someone is not telling the truth and is trying to remember what he should say, there is a slip as there was with Aguilar when he first testified that Matthews said "we don't hire non-union." Only after Counsel for General Counsel asked Aguilar about this testimony, did he correct himself using a double negative, testifying that Matthews said "[w]e don't hire no union people here." 15 This alleged statement was a figment of Aguilar's imagination, dreamed up in his attempt to show antiunion animus on the part of GBIC. Similarly, in my opinion Matthews alleged question, namely, "you ain't no union spy are you" never occurred. In my opinion, it is not determinative that Matthews was never asked about this alleged statement.

20 The attempt to show antiunion animus continued when Aguilar testified that Hawkins on January 15 said "you're that union guy from Arizona, you're not going to pass out all your business cards or any handbills here are you." Hawkins' testimony that he did not know that Aguilar was a union organizer or union supporter when he was at Tonopah is credited. Indeed 25 Aguilar himself testified that during the application process and during his employment at Tonopah he did not disclose to management that he was affiliated with the Union, and he did not give his business card to anyone in supervision or management at Tonopah. Counsel for General Counsel did not demonstrate that Hawkins knew about Aguilar's union activity at Tonopah. Aguilar's testimony is not credited. Hawkin's testimony that he did not make this statement is credited. 30

35 And finally Aguilar attempted to show antiunion animus in testifying that when he was terminated at Autaugaville Hawkins said that he was a good shop man in Arizona and he was going to be a good shop man at Autaugaville but the same thing happened to him as happened to his buddy Hamman. As noted above, when asked on cross-examination why this alleged reference to Hamman was not in his affidavits, Aguilar testified that he just recalled Hawkins' alleged statement when he testified at the trial herein. At this point it appears that Aguilar was making it up as he went along. Hawkins testified that he did not make this statement. Why would he? At Tonopah the cell phone policy was GBIC's. At Autaugaville the cell phone policy 40 was not GBIC's. These two policies were different. Under the former, unlike the latter, there was some latitude, and Hammon was given the benefit of this. While GBIC's cell phone policy at Tonopah was the reason for the conversation between Hawkins and Hamman, it was not the policy but rather what Hamman said that caused his termination for insubordination. Hawkins was initially willing to treat his discussion with Hamman regarding the latter's use of a cell 45 phone as a warning. Hamman was not willing to accept this. Aguilar fabricated this testimony in an attempt to show that he like Hamman engaged in union activity and was then terminated under a cell phone policy. The problem with this is that it has not been shown that Matthews or Hawkins was aware of any union activity on the part of Aguilar. Also Hawkins testified that he was not aware that Hamman was a union organizer or supported the Union. Aguilar testified 50 that Hamman wore a union shirt to work. But if he did why, according to Aguilar's testimony, would Davis be asking Aguilar if Hamman was union? Aguilar also testified that Davis said that Hamman was terminated for using a cell phone while on the jobsite. Aguilar did not testify that

Davis said that Hamman was terminated for union activity. Hawkins' testimony that he did not make this statement to Aguilar on January 15 is credited.

Contrary to the testimony of Aguilar, Matthews did not tell him on January 15 that he could use his cell phone in the portable restroom. Counsel for General Counsel did not show that Matthews had ever told any of the many GBIC employees at the Autaugaville site that notwithstanding Southern Company's strict rule, they could use their cell phones in the portable restroom. Why would Matthews make an exception for Aguilar? Aguilar admits that he told Matthews that he was getting bad coverage with his cell phone. If Aguilar could not use the cell phone because he was not getting a good signal, is it reasonable to expect that Matthews believed that he could trap Aguilar? Notwithstanding Aguilar's assertion to Matthews about getting bad coverage, admittedly he was able to use his cell phone to speak with Lemus. As pointed out by GBIC on brief, it defies common sense that GBIC would risk damaging the good will of a customer by blatantly flouting its strict no-cell phone policy. Also, from a common sense standpoint while one may not be able to see someone in a portable restroom speaking on a cell phone, someone passing by would have to wonder who the occupant was talking to and how the occupant was able to talk to someone else. Where no one can see does not equate with where no one could hear.

Aguilar did not protest when he was terminated on January 15. One would expect that if Matthews told him that he could use the cell phone in the portable restroom, he would either have said to Matthews "you told me I could use the cell phone in the portable restroom" or to Hawkins "what is going on here? Matthews told me I could use the cell phone in the portable restroom, and now he is terminating me for doing what he said I could do." As noted above, Aguilar testified that when Matthews took him back to GBIC's trailer after finding him using his cell phone, Hawkins was already filling out the termination report, namely GBIC 282 of General Counsel's Exhibit 16. Matthews testified that he filled out the termination report. An examination of the termination report reveals just that. Matthews signed it and the writing on the termination report is not that of the person who filled out the hire form, GBIC 284. Even the spelling of Aguilar's name is different on the two forms. Additionally Matthews explained why he put the wrong date "1-14-03" on the termination report. Hawkins filled out the hire form. Matthews filled out the termination report. So it appears that Aguilar attempted to mislead both with respect to who filled out the termination report and the timing. Perhaps Aguilar wanted to leave the impression that he was setup and Hawkins was filling out the termination report before Matthews even got back to GBIC's trailer. Or perhaps Aguilar wanted to leave the impression that Hawkins was filing out the termination form before Aguilar was even given a chance to explain his side. But then Aguilar did not protest the termination. Aguilar did not offer an explanation to Hawkins.

With respect to Aguilar's termination on January 15, under *Wright Line*, 251 NLRB 1083 (1980) enf'd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983), Counsel for General Counsel established that Aguilar engaged in union activity at GBIC's Tonopah jobsite in Arizona. General Counsel has not demonstrated, however, that when Aguilar was discharged at Autaugaville those supervisors who were present at the time, Matthews and Hawkins, were aware of Aguilar's union activity at the GBIC Arizona job site. Matthews, who terminated Aguilar, did not even work at the Arizona jobsite. Aguilar conceded that during the application process and during his employment at the GBIC Tonopah job site, he did not disclose to management that he was affiliated with the Union. Hawkins' testimony that before the charge was filed against GBIC he had no idea that Aguilar was a Union organizer is credited. Counsel for General Counsel has not demonstrated antiunion animus on the part of GBIC. It has not been shown that Aguilar was terminated for any reason other than using a cell phone at the jobsite after he

was told that if he did, he would be terminated. On the one hand, Counsel for General Counsel has not made a prima facie case. On the other hand, GBIC has demonstrated that it had a business justification for terminating Aguilar, and the same action would have taken place absent any protected conduct.

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One would have expected Aguilar's testimony to be corroborated or at least supported in some way. Such was not the case for although Aguilar had a tape recorder on him at Autaugaville on January 15, he did not capture any of the alleged unlawful statements of Matthews and Hawkins. While at one point Aguilar testified that the recorder was old and it stopped, at another point Aguilar testified that the reason he did not have Hawkins' alleged unlawful statement on the tape was that the tape was a 60 minute tape and Hawkins arrived more than 60 minutes after Aguilar arrived at Autaugaville. It would appear, therefore, that Aguilar is asserting that the reason that the recorder stopped was that the tape was used up, not because of some malfunction. There is no adequate explanation why Aguilar could not have turned the recorder off to save tape in order to capture his conversations with Matthews and Hawkins. Or he could have gone to the rest room to replace the tape. But the nail which, in my opinion, sealed the lid was Aguilar's own testimony that while in the "Port-a-John" on January 15 he told Lemus that "hey, I think they found out who I am" (transcript page 252). Aguilar can have it one way or the other way but he cannot have it both ways at the same time. If, as Aguilar alleges, Hawkins told him before his conversation with Lemus "you're that union guy from Arizona, you're not going to pass out all your business cards or any handbills here are you" (transcript page 196), then Aguilar would not subsequently be telling Lemus "hey, I think they found out who I am" (transcript page 252) (Emphasis added.). If Aguilar's testimony about what Hawkins said to him in the trailer on January 15 is true, Aguilar would have known that the Respondent knew who he was and he would not subsequently be telling Lemus "hey, I think they found out who I am" (transcript page 252) (Emphasis added.). Aguilar was not a credible witness.

With respect to paragraph 9 of the complaint, which alleges that GBIC failed and refused to consider for hire and failed and refused to hire the above-described applicants, Counsel for General Counsel, on brief, contends that he has established a prima facie case under *FES*, 331 NLRB 9, 12 (2000) in that (1) GBIC was hiring at the time, (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements,<sup>12</sup> or that the requirements were themselves pretextual or were applied as a pretext for discrimination, and (3) that antiunion animus contributed to the decision not to hire the applicants; and that GBIC did not affirmatively show that it would not have hired the applicants even in the absence of the applicants' union activity or affiliation. The Respondent on brief argues that while it does not dispute that (1) GBIC was hiring at the time, and (2) the involved applicants had experience or training relevant to the announced or generally known requirements of the position for hire, General Counsel has failed to produce any evidence of antiunion animus since the only direct evidence of antiunion animus is the testimony of Aguilar about the alleged January 15 comments of Matthews and Hawkins, which testimony should not be credited; that without Aguilar's testimony, General Counsel's refusal to hire case collapses; that General Counsel failed to establish that the alleged discriminatees were bona fide applicants; that there is no evidence of disparate treatment that would support a finding that GBIC's refusal to hire the alleged discriminatees was based on antiunion animus; that GBIC's hiring at Autaugaville was

<sup>12</sup> Counsel for General Counsel contends that three of the individuals (Manuel Aldana, Sandro Moreno, and Cecilo Ramos) whose applications were included in Respondent's Exhibit 12 had actually been placed on Respondent's payroll the same day they applied.

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consistent with its hiring policy; that while General Counsel will contend that Manuel Aldana, Sandro Moreno, Cecilio Ramos-Natividad, and Virginia Mojica were off-the-street hires because their applications are among the applications of nonunion, nonhires in Respondent's Exhibit 12, there is no evidence that GBIC hired these individuals from their applications but rather the

5     unrebutted testimony is that collectively they were referrals, transfers, or rehires; that GBIC would not have hired the union applicants notwithstanding any antiunion animus; and that General Counsel cannot establish that GBIC refused to consider the alleged discriminatees for employment because there is no evidence that GBIC refused to accept their applications or otherwise indicated that it would not consider their applications.

10           With respect to antiunion animus, Counsel for General Counsel contends as follows:

          The coercive statements Superintendent Matthews and Project Manager Hawkins made on January 15, 2003, ... demonstrate that the Respondent viewed the

15           applicants' Union affiliation with a hostile eye. Particularly, Superintendent Matthews' statement that the Respondent created a sign saying it was not accepting applications in response to the commotion the Union caused by having members apply for work, demonstrates that the Respondent was also willing to adjust its business... practices in response to the Union members applications. [Counsel for General Counsel's brief page

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The problem with this contention is that the testimony of Aguilar on this point is not credited. And even if it were, Aguilar did not testify that Matthews said that the Respondent created a sign saying it was not accepting applications in response to the commotion the Union caused by

25           having members apply for work. The testimony of at least two witnesses that the English version of the sign was placed on the door into the office well before January 14 is credited. This testimony was not rebutted. On January 14 Aguilar worked on a Spanish translation of a sign which had been posted well before the Union members applied at GBIC's Decatur office. Also unrebutted is the testimony of at least two witnesses that even when the sign was up

30           applications were accepted by GBIC. Counsel for General Counsel has not, in my opinion, shown antiunion animus and, therefore, it has not established a prima facie case.

          On the other hand, the Respondent has affirmatively shown that it would not have hired the applicants even in the absence of the applicants' union activity or affiliation. Counsel for

35           General Counsel did not rebut GBIC's showing that, with a minor exception, it fills its staffing needs at Autaugaville by transfer, rehire, and referral from supervisors and GBIC employees. GBIC established that it did not look at the off-the-street applications filed at the Decatur office when it hired for the Autaugaville job. It satisfactorily explained why some of those hired did fill out applications at the Decatur office and why a few of the individuals with applications in

40           Respondent's Exhibit 12 (as here pertinent, Manuel Aldana, Sandro Moreno, and Cecilio Ramos-Natividad) were in fact hired because they were referrals or rehires and not because they filled out an application at GBIC's Decatur office. As noted above, Carrera was not a transfer, rehire, or a referral from a GBIC supervisor or employee. But the Respondent's explanation that Carrera was referred by the employees of a union company that GBIC was

45           working with at the Autaugaville jobsite, that the union company was giving GBIC trouble, and the hiring was viewed as an opportunity to promote harmony on the job was not rebutted by Counsel for General Counsel. While this one instance was an exception to the Respondent's policy, it does not demonstrate that the Respondent was not otherwise following its policy. The Board has held that an employer may lawfully apply a policy of hiring only former employees

50           and persons referred by known individuals. See *Kanawha Stone Co.*, 334 NLRB 235 (2001). The Respondent's hiring at Autaugaville was consistent with its hiring policy. The policy was in existence before January 14. Thus it was not specifically adopted to counter the Union's salting

campaign. Counsel for General Counsel has not established that the Respondent's referral policy created a closed hiring system, effectively screening out union supporters, or that the Respondent applied its hiring policies disparately. While it has not been shown that a declared union member was hired at Autaugaville under the Respondent's policy during the relevant period, Counsel for General Counsel has not established that Respondent's policy inevitably bars union members from referral or that the Respondent adopted the policy in order to eliminate the possibility that union adherents would be hired. Counsel for General Counsel did not rebut Wright's testimony that GBIC has hired union members at its jobs in Portland, Chattanooga, and possibly Noonan. The bare fact that no declared union applicants were hired under the referral policy, without more, is not a ground for inferring that the Respondent's hiring motives were unlawful. The Respondent's hiring policy excluded a large number of nonunion, as well as union, applicants who did not meet the Respondent's criteria. This suggests that antiunion discrimination did not influence the Respondent's hiring decisions. See *Ken Maddox Heating & Air Conditioning*, 340 NLRB No. 7 (September 5, 2003).

With respect to whether the applicants were bona fide and whether the Respondent would have hired the involved applicants in view of the deficiencies in their applications, and how they conducted themselves while applying, Counsel for General Counsel contends that the Respondent did not substantiate its claim that the applicants were other than bona fide; that there has been no showing by the Respondent that any applicants whom the Respondent otherwise would have hired were turned down because of deficiencies in their application; and that the deficiencies defense is purely hypothetical. The Respondent argues that the General Counsel failed to establish that the alleged discriminatees were bona fide applicants; that the manner in which the alleged discriminatees applied by bringing a video camera to the Decatur office establishes that they had no interest in working at GBIC; that many of the involved applications were incomplete, lacking even the most basic information; that there would have been a substantial pay cut for most of the applicants; that the alleged discriminatees had no interest in giving GBIC an opportunity to hire them, only an interest in filing an unfair labor practice charge; and that not a single one of the involved applicants ever subsequently contacted GBIC to determine if they were being considered for a job. As indicated by Judge Frye in *Heliger Electric Corp.*, 325 NLRB 966 (1998), the right does not exist, as a matter of law, for a job applicant to videotape an employer's application-interview process. And the Board affirmed, as here pertinent, certain conclusions of Judge Carson in *Tann Electric*, 331 NLRB 1014 (2000), one of which was that the involved employer was not obligated to consider for hire, or to hire, applicants who, in the application process itself, chose to present themselves in a group, the leadership of which would not honor requests to turn off the video camera being used to videotape the application process. As noted above, Union member Weldon testified that Marsh did not turn off the video camera, he left it on but he set it down on a table.

And finally, with respect to whether the Respondent failed and refused to consider for hire the involved applicants, the Respondent correctly points out that under *FES*, supra, to establish a discriminatory refusal to consider violation, the General Counsel must establish that (1) GBIC excluded applicants from a hiring process, and (2) antiunion animus contributed to the decision not to consider the applicants for employment. The Respondent argues that it gave the union applicants the same consideration it gave to any other off-the-street applicant; that there is no evidence that the union applicants even sought to obtain referrals; and that GBIC would never have hired the union applicants for the Autaugaville job because it was not necessary to review any of the off-the-street applications. Counsel for General Counsel, as part of his case-in-chief, did not make the necessary showing with respect to antiunion animus and, therefore, he did not meet his threshold burden under *FES*, supra. The Respondent did show that it lawfully would not have considered the union applicants, even in the absence of their union activity, because none of the applicants met any of the Respondent's three hiring criteria.

As noted above, on the one hand, Counsel for General Counsel has not established a prima facie case under *FES*, supra. On the other hand, the Respondent has demonstrated under *FES*, supra, that it would not have hired the alleged discriminatees who applied on January 14 even in the absence of their union activity or affiliation.

As I have found each allegation of the complaint to be without merit, I shall recommend that the complaint be dismissed in its entirety.

#### Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The involved Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

#### ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C.

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John H. West  
Administrative Law Judge

<sup>13</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.